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SUPREME COURT OF THE UNITED STATES

FALL TERM 1948

No.....

NORA ALICE ADKINS, LOIS CARTER BALDWIN, SALLIE E. BAKER and LELIA Z. ADAMS,
Petitioners,

versus

J. W. HAMILTON, AS TAX COLLECTOR OF JEFFERSON COUNTY, ALABAMA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, NORA ALICE ADKINS, LOIS CARTER BALDWIN, SALLIE E. BAKER and LELIA Z. ADAMS, respectfully petition this Honorable Court for a Writ of Certiorari to the Supreme Court of Alabama.

Summary Statement of the Matter Involved

This cause raises the question of whether the Board of Tax Equalization of Jefferson County, Alabama,[1] has, in the administration of the taxing authority vested in it by

[1]The tax assessing authority in and for said County and State, Title 51, Chapter 8, 1940 Code of Alabama.

the Legislature of the State of Alabama, denied petitioners, and others similarly situated, equal protection of the laws in abridgement of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States of America.

The case arose as follows:

The petitioners began the proceedings in the Equity Division of the Circuit Court of Jefferson County, Alabama, in behalf of themselves and other taxpayers similarly situated on July 11, 1947, to enjoin the collection of an increase assessment made final against their respective real property by the Board of Tax Equalization for the tax year 1947.[1] R. 1.

Several thousand similarly situated taxpayers filed petitions for intervention, which have not been passed upon.

The respondent, J. W. Hamilton, as Tax Collector of Jefferson County, Alabama, the Tax Assessor, and the members of the Board of Tax Equalization of Jefferson County were made party defendants to the original proceedings.

The cause was presented to the Trial Court for writ of injunction upon Bill, Answer and Affidavits. R. 118. The Court granted relief to petitioners by writ of injunction against the respondent, J. W. Hamilton, as Tax Collector, on the ground that the increase assessment violated the equal protection clause of the Federal Constitution. Relief was denied against the Tax Assessor and the members of the Board of Equalization.[2]

The respondent, J. W. Hamilton, as Tax Collector, prosecuted an appeal to the Supreme Court of Alabama, which Court on April 8, 1948, entered a judgment dissolving the injunction, reversing, rendering and remanding the cause.[3]

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[1] Under State law, the tax year 1947 began October 1, 1946, and ended September 30, 1947. 1947 taxes become due and payable October 1, 1947.

[2] Full text of trial court's opinion appears at page 121 of Record.

[3] Full text of the appellant court's opinion appears at page 134 of Record. Reported 35 So. 2nd. 183.

The illegality of the increased assessment arises out of a so-called "four-year plan" adopted by the Board of Equalization to reappraise and increase the assessed value of all units[1] of taxable real property in Jefferson County, Alabama, by piece-meal and from year to year, to meet a present general increase in market prices of real property throughout the County.

Under the pleading filed in the Trial Court, petitioners averred and the respondent admitted: That all units of taxable real property situated in Jefferson County, Alabama, were, for the tax years 1941, 1942, 1943, 1944 and 1945 relatively just and equitably assessed for tax purposes, in that all of such units were assessed at the same, or substantially the same, percentage of the then fair and reasonable market value, as ascertained and fixed by the Board of Tax Equalization. R. 46, 51.[2] That during 1946, the Board adopted a four-year plan to increase the assessment of all units of taxable real property in the county to sixty per cent of the then reasonable market value, to meet the general market increase of all real property within the county. Under this plan, Jefferson County was divided into four districts. The assessment of properties located in one district was reviewed and reappraised in the first year, with a like procedure to follow in the other districts, respectively, in the next succeeding three years; with the idea that at the end of four years all assessments in the county will have been increased to sixty per cent of the then market price.

Pursuant to this plan, the Board completed the first step in its plan in 1946 by increasing the assessment of properties lying in the area of the county generally known as Shades Valley. The assessment of units of properties lying in the rest of the county were not increased in assessment

[1] Under statute, Title 51, Section 80, separate assessment is made for each lot or parcel of land. This method of assessing is referred to as the unit method of assessing real property.

[2] The respondents aver in answer that the assessments over said period of time were 60% of the then fair and reasonable market value thereof, in accordance with statutory requirements. Title 51, Section 17, 1940 Code of Alabama.

for 1946 tax year.[1] In 1947, the Board of Equalization increased the assessment of properties lying in the district generally known as the Elyton Land Company Survey. The properties of petitioners lie in the latter district. Properties being without this district and the Shades Valley district were not increased.

The Board anticipates the completion of steps three and four in its plan during 1948 and 1949.

The denial of equal protection results to petitioners, and others similarly situated, because assessments in the part of the county where their properties lie has been increased in assessed value to 60% of the 1946 market price, while properties lying in the districts to be increased in the years 1948 and 1949 are continued on the tax rolls on the basis of 60% of 1941, 1942, 1943, 1944 and 1945 market values, notwithstanding the present price increase is county-wide. The disparity in assessed values ranges from 10% to 60%, according to the sworn answer filed in behalf of the respondents. R. 55.

The Trial Court held that the four-year plan was not a permissible plan, because it denied to petitioners equal pro-

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[1]According to the answer filed in the trial court, in behalf of respondent, there are 164,000 separate units of taxable real property situated in Jefferson County.

For the tax year 1946 the Board reappraised approximately 7,000 of said units situated in the Shades Valley district and assessed such units at 60% of the then fair and reasonable market price. 157,000 units situated in the rest of the county were continued on the tax rolls on the basis of 1945 assessments.

In 1947 the Board reappraised approximately 28,000 units of said 164,000 units situated generally in the district known as Elyton Land Company Survey. Of said 28,000 approximately 20,000 were increased in assessed value in amounts ranging from 10% to 60%. Some 4,000 parcels were left unchanged in assessed value, and approximately 4,000 parcels situated in various sections of the county were increased in assessment on account of new buildings or additional improvements. All of said assessments being based upon 60% of the then fair and reasonable market value.

Units lying without the Shades Valley and Elyton Land Company Survey were not reappraised.

The respondent attempts to justify the failure of the Board to reappraise all units in the county before increasing the assessments, on the basis that the Board reappraised as much of the county as it was physically possible for its members to do in one year. And further that as a part of the Board's plan to equalize all units, the Board proposes and intends for the tax year 1948 to reappraise approximately 47,000 units in the district generally referred to as the industrial area of the county; and for the tax year 1949 to reappraise the portion of the county which it may not have reappraised in 1948.

tection of the laws. The Trial Court said:

"It is the opinion of the court that the four-year plan of review and revision of assessments (as they existed as of October 1st, 1945) employed by the Board of Equalization is, by reason of a substantial increase in value of practically all real property in Jefferson County, Alabama, since October 1st, 1945, inconsistent with the equal protection clause of the Federal Constitution. . . ."

In reversing, rendering and remanding the cause, the Supreme Court of Alabama recognized the principle that discrimination in the assessment or valuation by administrative officers may result in violation of the equal protection clause. But further held that before this result can be reached, it must be shown that the taxing officials are chargeable with a purpose or design to discriminate by a systematic method.

The Supreme Court of Alabama held the four-year plan permissible on the theory that the plan was born of necessity,[1] and contemplates a complete equalization at the end of four years; that the inequality is merely temporary, therefore, there cannot be a design or an intention to discriminate just because the reassessments are not done in less time than men are physically able to do the job.

JURISDICTION

1. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, (U. S. C. A., Title 28, Sec. 344 (b)), as revised by Title 28, U. S. Code, Section 1257 (3).

2. The judgment to be reviewed was rendered by the Supreme Court of Alabama, the highest court of said State, in which a decision could be had on April 8th, 1948. Application for Rehearing was filed by the petitioners, considered by the Court and overruled on May 13th, 1948. By

[1]Because, as the Court found, the Board, as constituted, could not in all its working time humanly do the job in less than four years.

order of the Court, the time within which to file petition for writ was extended to and including September 25, 1948. R. 151.

3. The Federal Constitution issue is properly reserved for review in this Court. The petitioners specially set up by their pleading filed in the Trial Court, and there was drawn in issue in the cause a title, right, privilege or immunity claimed by them under the equal protection clause, in the following language:

"Your complainant avers that said increased assessment * * *, is unjust and discriminatory in that such plan of increasing all of the units of taxable real property in Jefferson County, Alabama, by piece-meal and from year to year, based upon a present general price increase of property throughout the county, deprives your complainant, and others similarly situated, of property without due process of law and denies to your complainant and others similarly situated equal protection of laws contrary to the Fourteenth Amendment to the Constitution of the United States, in that said plan results in the intentional, systematic, undervaluation by the Board of Tax Equalization of taxable property of the same type belonging to the other owners, to wit: The owners of One Hundred Twenty-Five (125,000) Thousand units of taxable real property situated in said county." R. 29.

The Trial Court decided the Federal question, in holding that the so-called four-year plan is inconsistent with the equal protection clause. R. 124.

The opinion of the Supreme Court of Alabama affirmatively shows the question was presented to, considered and decided by it. R. 135.

The specific contention that the plan of reassessment violated the equal protection clause of the Fourteenth Amendment was presented by petitioners on application for rehearing and was considered and overruled by the Supreme Court of Alabama. R. 148.

4. The Supreme Court of Alabama, in said cause, has decided a Federal question of substance in a way not in accord with applicable decisions of this court, including the cases of:

Cumberland Coal Co. v. Board, etc., 284 U. S. 23, 52 S. Ct. 48.
Raymond v. Chicago Union Traction Co., 207 U. S. 20.
Fargo v. Hart, 193 U. S. 490.
Sioux City Bridge Co. v. Dakota County, 260 U. S. 411.
Hillsborough v. Cromwell, 326 U. S. 620.
Great No. Ry. Co. v. Weeks, 297 U. S. 135, 80 L. Ed. 532.
Cummings v. National Bank, 101 U. S. 153.
Sunday Lake Iron Co. v. The Town of Wakefield, 247 U. S. 350.
Concord Tire Co. v. Illinois, 292 U. S. 535, 78 L. Ed. 1411.

5. Cases believed to sustain the jurisdiction of this Court are as follows:

Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69; L. Ed; 67 S. Ct. 156
Gospel Army vs. Los Angeles, 331 U. S. 543; L. Ed., 67 S. Ct. 1428.
Mower vs. Fletcher, 114 U. S. 127; 29 L. Ed. 117.
North Carolina Railroad Co. vs. Story, 268 U. S. 288; 69 L. Ed. 959.
Clark vs. Willard, 292 U. S. 112, 78 L. Ed. 1160, 54 S. Ct. 615. Also see 43 Columbia L. Rev. (1943) 1002.

Question Presented

May the state taxing authorities intentionally adopt a systematic plan under which some properties of the same class are assessed at only a part of their true value for tax purposes, while taxing other properties of the same class at their full value without denying the equal protection of

the laws to a taxpayer whose property is assessed at its full value?

This question presents the issue as to the correctness of the position of the Supreme Court of Alabama, that: Discrimination in the assessment or valuation of taxable properties by administrative officers may result in violation of the equal protection clause of the Fourteenth Amendment to the Federal Constitution, only if it be also shown that the officials are chargeable with a purpose or design to discriminate by a systematic method.

Also:

a. Whether state taxing authorities may temporarily discriminate against one taxpayer, in the administration of a property tax statute, under a plan adopted and systematically followed, which contemplates equalization of the tax burden only at the end of four years.

b. Whether state taxing authorities may discriminate against one taxpayer or a class of taxpayers in the administration of a property tax statute because it is said the Board of Equalization as presently staffed cannot physically do the job so as to accord equality.

Reasons Relied on for Allowance of the Writ

1. The Supreme Court of Alabama has held:

a. That where one or more of a class of taxpayers are assessed at sixty per cent of the fair and reasonable market value of their property, in accordance with statutory requirements, and properties of other taxpayers of the same class are intentionally and systematically assessed at a lower percentage, under a plan systematically and intentionally adopted by the tax assessing officers, such system of assessment does not violate the equal protection clause of the Fourteenth Amendment to the Federal Constitution, with respect to one taxed upon the full value of his property, unless it is also shown that the officials are chargeable with a purpose or design to discriminate by such systematic method.

b. That no such purpose or design to discriminate can be attributed to the Board of Tax Equalization because it is physically impossible for its present staff to complete a reappraisal of all the taxable property in the County in less than four years, and that consequently, the petitioners are not denied the equal protection of the laws:[9]

c. That petitioners are not denied the equal protection of the laws because the admitted discrimination is only temporary and complete equality will be attained at the end of four years.[10]

No decision of this court has ever ascribed any such meaning to the Equal Protection Clause of the Constitution.

Thereby, the Court disregarded the decisions of this Court which hold, that: The intentional, systematic undervaluation by state officials of taxable property of the same class belonging to other owners, contravenes the Constitutional right of one taxed upon the full value of his property. And, that: Where it is impossible to secure both the standard of the true value and the uniformity and equality required by law, the latter must be preferred as the just and ultimate purpose of the law.

Cumberland Coal Co. v. Board, etc., 284 U. S. 23, 52 S. Ct. 48.
Raymond v. Chicago Union Traction Co., 207 U. S. 20.

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[9]In attempting to justify the discrimination, the Supreme Court of Alabama said: "We think the record shows that it takes four years to review and reappraise all the taxable units in Jefferson County. How can there be a design or intention to discriminate just because the review and reappraisal are not done in less time than men are physically able to do the job? Assuming for the sake of argument that there is the vice of discrimination in the four-year plan, it's a fair question to ask how the vice can be removed? When the four year plan was completed in 1945 [counsel for respondent admitted that the so-called four-year plan had been in effect since 1916] the board of equalization might have refused to make further reviews and appraisals. This obviously would make a mockery of the functions of the board of equalization. More employees might be hired in order to make the equalization in one year. This is a matter with which the board of equalization cannot be charged. It employed all the help allowed by law. Under the circumstances the four-year plan was born of necessity and at most contemplates complete equalization at the end of four years * * *" Brackets supplied. This statement of the court follows the argument made in the courts below by counsel for respondent.

[10]"* * Any inequality is merely temporary. As we shall see when the review is merely partial, temporary and made in good faith, this tends to show lack of intention to discriminate."

Fargo v. Hart, 193 U. S. 490.
Sioux City Bridge Co. v. Dakota County, 260 U. S. 411.
Hillsborough v. Cromwell, 326 U. S. 620.
Great No. Ry. Co. v. Weeks, 297 U. S. 135, 80 L. Ed. 532.
Cummings v. National Bank, 101 U. S. 153.
Sunday Lake Iron Co. v. The Town of Wakefield, 247 U. S. 350.
Concord Tire Co. v. Illinois, 292 U. S. 535, 78 L. Ed. 1411.

In that aspect of the case in which the equal protection clause is invoked, the Supreme Court of Alabama has decided a Federal question of substance in a way not in accord with applicable decisions of this Court, thus a real discrimination between persons in similar circumstances is applied, material to their rights.

WHEREFORE, your petitioners pray that a Writ of Certiorari issue under the seal of this Court, directed to the Supreme Court of Alabama, commanding said Court to certify and send to this Court a full and complete transcript of the records and of the proceedings of the said Supreme Court of Alabama had in the case numbered and entitled on its docket, Sixth Division 679, J. W. HAMILTON, as Tax Collector of Jefferson County, Alabama, Appellant, vs. NORA ALICE ADKINS, LOIS CARTER BALDWIN, SALLIE E. BAKER and LELIA Z. ADAMS, Appellees, to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States; and that the judgment herein of said Court be reversed by this Court, and such further relief as to this Court may be proper.

This the 20th day of September, 1948.

Hugh A. Locke

HUGH A. LOCKE,
Counsel for Petitioners
WADE H. MORTON,
Of Counsel for Petitioners

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.....

NORA ALICE ADKINS, LOIS CARTER BALDWIN, SALLIE E. BAKER and LELIA Z. ADAMS,
Petitioners,

versus

J. W. HAMILTON, AS TAX COLLECTOR OF JEFFERSON COUNTY, ALABAMA
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

The Opinion of the Court Below

The opinion of the Supreme Court of Alabama appears at p.p 135-147 of the record. It is reported in 35 So. 2d, p. 183.

II.

Jurisdiction

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237 (b) of the Judicial Code, as amended by Act of February 13, 1925 [U. S. C. A. Title 28, Section 344 (b)], as revised by Title 28, U. S. Code, Section 1257 (3). The judgment of the Su-

preme Court of Alabama was entered on April 8, 1948. Application for rehearing was filed by the petitioners, considered by the Court and overruled on May 13, 1948. On the 21st day of July, 1948, this Court entered an order extending the time within which to file petition for Writ of Certiorari to and including the 25th day of September, 1948. R. 151.

III.

Statement of the Case

Under "Summary Statement of the Matter Involved" (Petition, ante page 1), a sufficient statement is made to fully understand the case, and is hereby adopted by reference.

IV.

Specifications of Error

1. The Supreme Court of Alabama erred in holding that

a. Where one or more of a class of taxpayers are assessed at sixty per cent (60%) of the fair and reasonable market value of their property, in accordance with statutory requirements, and properties of other taxpayers of the same class are intentionally and systematically assessed at a lower percentage, under a plan systematically and intentionally adopted by the tax assessing officers, does not violate the equal protection clause of the Fourteenth Amendment to the Federal Constitution, with respect to one taxed upon the full value of his property, unless it is also shown that the officials are chargeable with a purpose or design to discriminate by such systematic method.

b. No such purpose or design to discriminate can be attributed to the Board of Tax Equalization if it is physically impossible for its three-man staff to complete a reappraisal of all taxable property in the County in less than four years; that consequently one taxed upon the full value of his prop-

erty is not denied equal protection of the laws.

c. One taxed upon the full value of his property is not denied the equal protection of the laws if the admitted discrimination is only temporary and complete equality will be attained at the end of four years.

Summary of Argument

I.

The judgment of the Supreme Court of Alabama that the adoption, existence and result of the so-called "four-year plan," admitted by the respondents to exist in every maetrial particular as claimed by the petitioners, did not violate the equal protection clause of the Fourteenth Amendment to the Federal Constitution is a final and conclusive determination of the litigation.

Richfield Oil Corp. vs. State Board of Equalization, 329 U. S. 69, 67 S. Ct. 156.
Gospel Army vs. Los Angeles, 331 U. S. 543, 67 S. Ct. 1428.
Mower vs. Fletcher, 114 U. S. 127, 29 L. Ed. 117.
North Carolina Railroad Co. vs. Story, 268 U. S. 288, 69 L. Ed. 959.
Clark vs. Willard, 292 U. S. 112, 78 L. Ed. 1160, 54 S. Ct. 6155; see: 43 Columbia L. Rev. (1943) 1002.

The question, whether the judgment is a "final judgment," within the meaning of the Judicial Code Section 237 (b), (28 U. S. C. A. Section 344 (b)), as revised by Title 28, U. S. Code, Section 1257 (3) will be resolved not only by an examination of the entire record, but, where necessary, by resort to local law to determine the effect the judgment has under State Rules of practice.

Richfield Oil Corp. vs. Board, 329 U. S. 69, 67 S. Ct. 156.
North Carolina Railroad Co. v. Story, 268 U. S. 288, 69 L. Ed. 959.

Clark vs. Willard, 292 U. S. 112, 54 S. Ct. 615, 78 L. Ed. 1160.

SPECIAL FACTS WHICH SHOW THAT THE JUDGMENT OF THE SUPREME COURT OF ALABAMA HAS IN FACT FULLY ADJUDICATED RIGHTS AND THAT THE ADJUDICATION IS SUBJECT TO NO FURTHER REVIEW BY ANY STATE COURT.

Under local practice, the respondents were not required to answer the original bill of complaint, nor the amendments thereto, on application for a temporary writ, in order to avoid a confession of the facts alleged therein. The issue to be determined on the application for the writ being one of facts and of equitable jurisdiction, the whole burden of which was on petitioners. *Lynne vs. Ralph,* 201 Ala. 535, 78 So. 889.

Contrary to such local practice, the respondents filed their sworn answer to the amended bill, admitting the adoption and existence of the plan and attempting to avoid the effect thereof. The answer was noted in the "Note of Submission" by the respondents. The admissions contained therein were likewise noted by the petitioners. R. 118.

Alabama Equity Rule 25, Title 7, Page 1065, 1940 Code of Alabama[1] provides, among other things: "* * * a de-

[1]The matter and form of the answer. A defendant shall incorporate in his answer all the defenses which he desires to set up, which he has not already presented by plea. Defendants desiring to present the same defenses may do so by joining in the same answer; and if the court orders a separation of causes, and thereby the defendants be separated, after a joint answer has been filed, the answers may be taken as separate without being refiled. The answers shall be separated into appropriate sections, corresponding to the sections of the bill, and numbered correspondingly. Statements in the bill, or in another pleading may be adopted by reference, without being recopied; and a copy of any written instrument which is an exhibit to the bill, or the answer, or any other pleading, may be made a part of the answer for all purposes by so stating in the answer. A defendant shall state in short and plain terms his defenses to each claim asserted in the bill, and shall admit or deny or confess and avoid every averment of the bill. Averments not denied, nor confessed and avoided shall be taken as admitted. If he is without knowledge or information sufficient to enable him to admit, deny or confess and avoid an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder.

fendant shall state in short and plain terms his defenses to each claim asserted in the bill, and shall admit or deny or confess and avoid every averment of the bill. Averments not denied, nor confessed and avoided shall be taken as admitted. * * *" Under this rule, the Court must take the confession as true, and conclusive proof of the averments of the bill.

If the "* * * bill contains equity and is proved, he (petitioners) shall have the appropriate relief. * * *" *Equity Rule 16, Title 7, Page 1061, 1940 Code of Alabama. Prowell vs. Wilson,* 219 Ala. 645, 123 So. 38.

The sworn confession in the answer is binding upon the respondents in the pending cause. *Prowell vs. Wilson, supra.*

An opinion of the Supreme Court of Alabama, whether right or wrong, is the law of the case in which it is pronounced, and is binding on the Court below on a second trial of the cause; and if the facts in the case on the second trial are in every material particular the same as presented on the appeal, the trial court must render its judgment in accordance with the decision of the Supreme Court, and an affirmance of the judgment of the trial court is inevitable.

The facts in litigation having been confessed or admitted and the Supreme Court having passed on the merits of that issue, its decision controls and disposes of the litigation.

Montgomery vs. Gilmer, 33 Ala. 116.
Adams vs. Horsefield, 14 Ala. 223.
Malone vs. Carroll, 33 Ala. 191.
Douglas vs. City Council of Montgomery, 124 Ala. 489, 27 So. 310.
Lecroix vs. Malone, 157 Ala. 434, 47 So. 725.
Goodwin vs. McGehee, 15 Ala. 232.
Huffman vs. State, 30 Ala. 532.

II

The intentional, systematic undervaluation by State officials of taxable property of the same class belonging to

other owners, contravenes the constitutional right of owners taxed upon the full valuation of his property. And, where it is impossible to secure both the standard of true value and the uniformity and equality required by law, the latter must be preferred as the just and ultimate purpose of law.

Cumberland Coal Co. v. Board, etc., 284 U. S. 23, 52 S. Ct. 48, 76 L. Ed. 146.
Raymond v. Chicago Union Traction Co., 207 U. S. 20, 52 L. Ed. 78, 28 S. Ct. 7.
Fargo v. Hart, 193 U. S. 490, 48 L. Ed. 761, 24 S. Ct. 498.
Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 67 L. Ed. 340, 43 S. Ct. 190.
Great No. Ry. Co. v. Weeks, 297 U. S. 135, 80 L. Ed. 532.
Cummings v. National Bank, 101 U. S. 153, 25 L. Ed. 903.
Sunday Lake Iron Co. v. The Town of Wakefield, 247 U. S. 350, 62 L. Ed. 1154.
Concord Tire Co. v. Illinois, 292 U. S. 535, 78 L. Ed. 1411.

ARGUMENT

I.

This case is here on application for Writ of Certiorari to the Supreme Court of Alabama. The Court sustained a plan adopted by the Board of Tax Equalization of Jefferson County, Alabama, to increase the assessed value of all taxable real property in the county, by piecemeal over a four-year period. This increase was intended to meet a general increase in market value of real property throughout the county. The contention of the petitioners is that the plan adopted and partially completed, is repugnant to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The cause was presented to the trial court for temporary writ of injunction upon Bill, Answer and Affidavits. R. 116 The trial court granted relief to petitioners by writ of injunction against the respondent, on the ground that the plan assailed, confessed by sworn answer, violated the equal protection clause of the Federal Constitution. On appeal to the Supreme Court of Alabama, that Court dissolved the injunction, reversed, rendered and remanded the cause.[3]

We are met with the threshold question whether the judgment of the Supreme Court is a "final judgment," reviewable in this court, within the meaning of the Judicial Code Section 237 (b), (28 U. S. C. A. Section 344 (b)), as revised by Title 28, U. S. Code, Section 1257 (3).

Argument will no doubt be made by counsel for the respondent that under Alabama law where a cause has been reversed by the Supreme Court, without direction to dismiss, there is a new trial; with the right to amend the complaint and produce other evidence; and that on a new trial new or different findings of facts might be made. Such is the general rule. We respectfully submit, however, that the general rule is not controlling in the case at bar. To the contrary, under the facts and pleading, as they appear upon the record, there has been an effectual final determination of the litigation, which under local practice is conclusive upon a second trial of the cause in the lower court.

The mandate of the Supreme Court does not in terms direct the trial court to enter a decree against the petitioners. However, the trial court is bound to proceed in accordance with the opinion, as the opinion is the law of the case, binding on the court below on a second trial, as to all issues decided therein. The sworn answers confessed the adoption and existence of the plan, and attempted to avoid the vice thereof on the ground that the Board of Equalization, as presently staffed, cannot complete the reappraisal in less than four years. That is to say, it was the belief of the board

[3]The mandate of the court appears at R. 148. The opinion at R. 134.

that it was physically impossible for its present staff of three members to complete the appraisals so as to accord substantial equality. The sworn answer thus removed from the cause any factual issue as to the adoption and existence of the plan. The facts are therefore uncontroverted.

The denial of equal protection of the laws arises out of the plan assailed. The validity vel non of the plan is the issue in litigation. The adoption and existence of which is confessed, and the Supreme Court of Alabama has passed on the merits of that issue. Hence, there is nothing more to be decided.

The right to a new trial; amendment of the complaint and the production of other evidence, upon which new or different finding of fact might be made, becomes a mere technical right; a right in name only, unavailing in the instant cause to vary in the least the ultimate result. Under Alabama law if the facts are without dispute, the decision of the Supreme Court on former appeal is conclusive of the matter in issue, and the trial court is not at liberty to review the issues decided by the Supreme Court.

Under local practice, the respondents were not required to answer the complaint, nor the amendments thereto, on application for temporary writ, in order to avoid a confession of the allegations made therein. *Lynne vs, Ralph,* 201 Ala. 535, 78 So. 889. Notwithstanding such local practice, the respondents filed their sworn answer to the bill, confessing the plan under attack in the following language:

> "It is admitted to be true that all of the units of taxable real property situated in Jefferson County, Alabama, for tax years 1941, 1942, 1943, 1944 and 1945 were relatively just and equitably assessed in that all of such units of taxable real property were assessed for tax purposes at the same or substantially the same percentages of the fair and reasonable market value of all of such taxable units as ascertained and fixed by the Board of Equalization.
>
> "It is further averred that the existing Board of Equalization of Jefferson County was set up under

the Board of Equalization Acts of 1939, in May, 1939, and that the said Hill Ferguson as Chairman of said Board and the said Dewey Acker have served continuously as members of said Board since May, 1939. J. Paul Meeks served as a member of said Board from May, 1939, until January, 1947, and that the said Meeks was succeeded by the Respondents, the said John H .Taylor, on June 20, 1947. It is further averred that because of the large number of taxable units of property in Jefferson County and the large value of said property in Jefferson County which includes many industries and factories and plants, that it is a physical impossibility to review in one tax year the files of all of the taxable units of property in said County; and it is also a physical impossibility to make an on the spot inspection or appraisal of all of the units of taxable property in said County. It is possible to review in one taxable year a portion only of taxable property in said County for the purpose of equalizing and appraising said property at its fair and reasonable market value. It is possible to review within any one taxable year approximately one-fourth of the taxable units of property within this County.

"The Board of Equalization in the tax year 1940 commenced the policy and the plan to equalize as speedily as possible all of the units of property in the said County at 60% of the fair and reasonable market values thereof. In furtherance of such plan, the said Board reviewed approximately 7,000 units of property in the Shades Valley area and the close-in downtown districts of Birmingham. This review of said property in Shades Valley and the downtown district of Birmingham was as much as it was physically possible for the Board to review in said tax year. This limitation upon the amount of review in said year was due to the limited size of the Board and the restriction upon the number of employees and appraisers that could be employed by the Board. For the said tax year 1940, the Board equalized the said 7,000 units of property at 60% of the fair and reasonable market value thereof.

"* * *"

"* * *"

"The entire County of Jefferson and all of the real property thereof was reviewed and equalized within said four-year period from the tax year 1940 through the tax year 1943.

"In addition to the review of property above stated in said tax years 1940 to 1943 the Board also reviewed and equalized in each of said years over the entire County all additions to real property, improvements to real property and splits of said real property.

"The review and equalization of all of the real property in said County was completed and finished during said four tax years, and it is a physical impossibility to review and equalize the entire real property of said County within a less period of time than said four years. This system of review and equalization of a portion of said County has been actively employed and continuously used by the various tax boards and officials in said County since 1916. This system and plan of reviewing and equalizing the entire County within approximately four years has been used and accepted in said County since 1916.

"• • •"

"In 1944 and 1945 the Board ratified, confirmed and assessed the Tax Assessor's assessments for said years, but the war was going on and there was such uncertainty as to what would happen when peace was declared that no reappraisal of any section of the County was attempted in those years; but that changes in assessed values were made in the entire County which were occasioned by new buildings, additions to property, splits of property, and other routine changes.

"In 1946 six years after its original commencement of equalization and appraisal, the Board commenced a review and equalization of the entire County for the second time. The Board ratified, approved and assessed the 164,000 units which the Tax Assessor had set up for said current year, and concurrently reviewed and reappraised and equalized approximately 7,000 units of real property in Shades Valley. This review and reappraisal was for the purpose of equalizing at 60% of its fair and reasonable market value said 7,000

units of property; and said 7,000 units were equalized at 60% of the fair and reasonable market value thereof. It was a physical impossibility for the Board to review in said tax year 1946 more than the 7,000 units of property in said Shades Valley. In said tax year 1946, the Board reviewed and reappraised all of the property that it was physically possible to so review and reappraise and equalize in said tax year. This review and reappraisal in said Shades Valley was a part of the plan of the Board to equalize as speedily and thoroughly as possible all of the real property in said County at 60% of its fair and reasonable market value.

"In the tax year 1947, the Board in furtherance of its plan to equalize as speedily and thoroughly as possible the entire county, ratified, approved and assessed the 164,000 units which the Tax Assessor had set up for said year and concurrently reviewed and reappraised and equalized approximately 28,000 units of real property in the city of Birmingham, and in certain sections South of Birmingham in Range 2, and in various sections of the entire County. Of said 28,000 parcels approximately 20,000 were increased in assessed value in amounts ranging from 10% to 60% and approximately 4,000 units of said 28,000 units were left unchanged in assessed value, and approximately 4,000 units of said 28,000 units were situated in all sections of Jefferson County and were increased in assessed value because of new buildings, additional improvements, and installations which justified an increase in the fair and reasonable market value thereof. It is averred that all of said 28,000 units were equalized at 60% of the fair and reasonable market value thereof, and that it was a physical impossibility for said Board to have reviewed and reappraised more than said 28,000 units of property. The Board reviewed and reappraised and equalized as much of the said County as it was physically possible to do in said year. It is averred that the Board and said Respondents as a part of its plan to equalize as speedily and thoroughly as possible said County, propose and intend for the tax year 1948 to review and equalize as much of said County as is physically possible so to review and equalize, which will probably consist of approximately 47,000 units

in Bessemer, Hueytown, Brighton, and the industrial plants between Bessemer and Ensley, and the mining districts on Red Mountain, and remaining units in Birmingham.

"For the tax year 1949 the said Board and the Respondents propose and intend to review and equalize any portion of the County which it may not have finished in 1948. It is probable that for the tax year 1949 the Board of Equalization will review and equalize approximately the 40,000 remaining parcels in the County most of which lie in Ranges 3, 4, 5, 6, 7 and 8. It is averred that the Board of Equalization and the Respondents working full time during the entire year and making use of all of the employees and appraisers authorized by law cannot review and equalize the entire property in said County in less than four tax years. That the plan and policy of said Board and said Respondents, have been to review and equalize and complete said work of reviewing and equalizing said entire County within a term of four years, and that there is not and has not been any plan or intent to systematically or intentionally discriminate or otherwise discriminate against any area of said County or class of taxpayers or class or property within said County. It is averred that the enormous amount of clerical work required to review and equalize the property of said County and the large magnitude of assessed value of the property in said County and the limited membership of the Board and its employees render it impossible to complete a detailed and thorough review of the individual units of property within said County in less than a four-year period of time. It is averred that the sole plan and intent of said Board and said Respondents is to review and equalize at 60% of the fair and reasonable market value all property both real and personal within said County as speedily and accurately and thoroughly as it is possible to do so working full time during the entire tax year.

"* * * It is admitted that approximately 7,000 of the owners of the approximately 20,000 units of taxable real property in Jefferson County the assessment of which was increased by the Board of Tax Equalization for tax purposes for 1947, filed written protests of

such increased assessment within the time allowed by law. But it is denied that said increase upon said 20,000 units of taxable real property was based upon a general price increase of property throughout the County. It is averred that the increase made in the assessments of said 20,000 units of property varied from increases of 10% to 60% of the former assessed values thereof and that said increases in the assessed values for said year were made and based upon an increase in the fair and reasonable market value of said units of property in the amounts so increased, * * *" R. 51

Alabama Equity Rule 25, Title 7, p. 1065, 1940 Code of Alabama provides in part as follows: The "* * * defendant shall state in short and plain terms his defenses to each claim asserted in the bill, and shall admit or deny or confess and avoid every averment of the bill. Averments not denied nor confessed and avoided shall be taken as admitted. * * *" Thus the sworn confessions in the answer are binding on the respondent in the pending cause, and must be taken as conclusive proof of the averments of the bill. *Prowell vs. Wilson,* 219 Ala. 645, 123 So. 38.

The whole of the litigation relates to but one plan. All dispute as to the adoption and existence of which is fully confessed in every material particular, and the Supreme Court has passed on the merits of that issue.

Mr. Justice Stakley, in delivering the opinion of the appellate court, said: "Various reasons are advanced * * * as showing that the injunction should not have been issued, * * * but we think that it is well to go to the heart of the inquiry and consider the case on its merits; With this thought in mind, we have concluded that the injunction should not stand."

"* * *"

"* * *"

"There is no doubt that the board of equalization has adopted a systematic plan for equalization over a four-year

period. In this connection we quote from the answer of the respondents, especially since it shows the method used by the Board of Equalization. * * *" Then follows a lengthy quotation from the answer, in which the plan is admitted to exist. The answer is the basis of the court's conclusion: That "There is no doubt the Board of Equalization has adopted a systematic plan for equalization over a four-year period."

The Alabama cases cited supra necessarily forces the conclusion that the judgment of the Supreme Court has decided finally the issues in litigation, from some of which we will make brief quotations.

In speaking of the effect of a judgment and opinion of the Supreme Court on a second trial, in the case of *Adams vs. Horsefield,* 14 Ala. 223, the Court said: "It became the law of the case, and furnished a guide to all ulterior proceedings, so that it is not now allowable to look behind it, and again review questions which we have passed on and adjudicated." The opinion then stated that this rule has been so often recognized, not only in that court, but in all appellate tribunals, it is needless to cite authority to support it.

The Supreme Court, in addressing itself to this proposition, in the case of *Huffman vs. State,* 30 Ala. 532, said, *"This case has twice before been in this court; and the decision heretofore made must be the law of it, until it is finally disposed of. The facts of the case are now, in every material particular, the same which were presented in the previous bills of exceptions; and an affirmance of the judgment of the court below is inevitable."* (Emphasis supplied)

In the case of *Richfield Oil Corporation vs. State Board of Equalization,* 329 U. S. 69, 67 S. Ct. 156, this Court held the judgment of the California Supreme Court a "final judgment," reviewable by the Court, within the meaning of the Judicial Code Section 237, 28 U. S. C. Section 344 (a), (28 U. S. C. A. Section 344 (a)). The case was tried in

the lower court, on the pleadings and stipulated facts, a jury having been waived. The trial court found for the appellant. The Supreme Court reversed the judgment.

This Court, in granting the writ in the Richfield Oil Corporation case, said:

> "The designation given the judgment, by state practice is not controlling. *Department of Banking, State of Nebraska v. Pink,* 317 U. S. 264, 268, 63 S. Ct. 233, 235, 87 L. Ed. 254. The question is whether it can be said that 'there is nothing more to be decided' *(Clark v. Williard,* 292 U. S. 112, 118, 54 S. Ct. 615, 618, 78 L. Ed. 1160), that there has been 'an effective determination of the litigation.' *Market Street R. Co. v. Railroad Commission,* 324 U. S. 548, 551, 65 S. Ct. 770, 773, 89 L. Ed. 1171; see *Radio Station W. O. W. v. Johnson,* 326 U. S. 120, 123, 124, 65 S. Ct. 1475, 1477, 1478, 89 L. Ed. 2092. That question will be resolved not only by an examination of the entire record *(Clark v. Williard, supra)* but, where necessary, by resort to the local law to determine what effect the judgment has under the state rules of practice. *Brady v. Terminal Railroad Ass'n of St. Louis,* 302 U. S. 688, 58 S. Ct. 24, 82 L. Ed. 531; *Brady v. Southern R. Co.,* 319 U. S. 777, 63 S. Ct. 1028, 87 L. Ed. 1723. See Boskey, Finality of State Court Judgments under the Federal Judicial Code, 43 Col. L. Rev. 1002, 1005."

The suit was by Richfield Oil Corporation to recover a refund of retail sales tax paid under protest. Under the California Act, the taxpayer made payment of the tax and filed a claim for refund, setting forth the specific grounds upon which the claim was founded. The claim was denied, and the taxpayer instituted suit on the grounds set forth in such claim. The issues in litigation were restricted to the grounds set forth in the claim for refund. The facts in the case were stipulated.

Although the Supreme Court reversed the judgment, without direction, its decision was held to control the "disposition of the case," because (1) the issues were restricted

to the grounds set forth in the claim for refund; and second, "In California, a valid stipulation is binding on the parties. * * * It is available at a second trial unless in terms otherwise limited and will be controlling at the second trial unless the trial court relieves a party from the stipulation. * * *" See footnote number 1.

The instant case falls clearly within the influence of the Richfield Oil Case, supra, and authorities cited therein.

Under Alabama law and rules of practice 'there is nothing more to be decided,' the Supreme Court having decided the case on its merits after confession. Its judgment fully determined the rights of the parties; nothing remains to be done by the trial court except the ministerial act of entering judgment against the petitioners, which the appellate court has in fact directed.

In the case of *North Carolina Railroad Company* vs. *Story*, 268 U. S. 288, 69 L. Ed. 959, the Court granted certiorari to review a judgment of the Supreme Court of North Carolina. There the state Supreme Court had affirmed without more the trial court's refusal to continue a temporary restraining order and to grant a permanent injunction.

The facts in the North Carolina Railroad Company case were: Maggie Barber was killed in North Carolina by a collision between a train of the Southern Railway Company and a car in which she was riding. The accident occurred on a line of the North Carolina Railway Company, then under lease to Southern Railway Company. The administrator of the deceased sued the North Carolina Railway Company in the county court, charging negligence by defendant's lessee. The defendant denied that the death was caused by the negligence of its lessee or employes, because the railway was at the time being operated by the Director General of Railroads. There was verdict and judgment against the defendant for $2,500.00; an appeal was attempted, but not perfected.

Without seeking execution, a second suit was instituted by the administrator, on the first judgment. The defendant, by answer set up section 206 (g) of the Transportation Act. (Chap. 91, 41 Stat. at L. 456, 462, Comp. Stat. Section 10,071¼ cc, Fed. stat. anno. Supp. 1920, p. 79), as a defense, averring that the second suit was brought to evade the Act. The plaintiff demurred, on the ground that the first judgment was res judicata. The Court entered judgment for the plaintiff. On appeal the judgment was affirmed.

The company opposed execution in the trial court, and excepted to the order directing execution to Story, the Sheriff.

The Railway Company then brought action based on section 206 (g) against Story and the administrator to enjoin execution. The defendants answered, *admitting* the execution but pleaded the second judgment as res judicata. The company secured a temporary restraining order, and a rule to the defendants to show cause why the order should not be continued and made permanent. On hearing, the motion to continue the order and to make it permanent was denied. On appeal, the trial court's order was affirmed. (Emphasis supplied.)

This Court granted certiorari, because the judgment of affirmance was a final judgment, within the meaning of section "237 of the Judicial Code, as amended by the Act of September 6, 1916, Chap. 448, 39 Stat. at L. 726, Comp. Stat. Section 1214, Fed Stat. Anno. Supp. 1918, P. 411."

Mr. Chief Justice Taft in delivering the opinion of the Court said:

"Is this judgment a final judgment? We think it is. In its terms it affirms the refusal of the lower court to continue the temporary order and to grant a permanent injunction. The Supreme Court based its decision on the facts *admitted* in the petition and answer. Its judgment was that the previous judgment as between the parties was res judicata, estopped the company from resisting execution, and thereby

deprived it of any right to either a temporary or permanent injunction. Injunction was the only relief which the company sought or could seek under its petition and prayer. The affirmance of the judgment of the lower court upon the certified opinion of the Supreme Court, left nothing for the Guilford County Court to do but to dismiss the petition. * * *" (Emphasis supplied.)

Despite the fact that there was no explicit direction for the dismissal of the bill in North Carolina Railway Company case, the Court thought it plain from the record that the decision constituted a final denial of all the relief sought. Because the appellate court bases its decision on the facts *admitted* in the petition and answer, and the denial of the only relief sought or which petitioners could seek under the petition and prayer.

In the instant case the facts are admitted. The only relief sought is an injunction against the collection of an illegal increase in assessment of real property for taxation. The appellate court dissolved the injunction, and based its decision on the facts admitted. Holding that the petitioners are not entitled to relief on the merits of the case.

We, therefore, respectfully submit, the judgment of the Supreme Court of Alabama is a "final judgment," reviewable in this Court.

II.

In that aspect of the case in which the equal protection of the laws is invoked, the case turns upon the effect to be given a plan of proposed equalization of taxation in Jefferson County, Alabama, referred to as the "four-year plan."[1]

The denial of the equal protection of the laws result to petitioners because assessments in the part of the county

[1]Detailed statement of the plan is made in "Summary Statement of the Matter Involved," Petition, ante p. 1. Also in answer of the respondents quoted ante p. 18.

where their properties lie has been increased in assessed value to 60% of 1946 market value, while properties lying in the districts to be increased in 1948 and 1949 are continued on the tax rolls on the basis of 60% of 1941, 1942, 1943 market values, even though the market increase is county-wide. The disparity in assessed values range from 10% to 60%.

The grounds on which the Supreme Court held the petitioners were not denied equal protection of the laws are: (1) The denial of the equal protection of the laws may arise in the assessment of property for taxation, by administrative officers, *only if the officials are chargeable with a purpose or design to discriminate.* (Emphasis supplied.) (2) There can be no design or intention to discriminate when the three-man board of equalization in all of their working time does all that they can humanly do. (3) The record shows that it takes four years for the three-man board to reappraise all units of real property in the County. (4) More employees might be hired in order to make the equalization in one year. But this is not a matter with which the board can be charged. It employs all the help allowed by law. Under these circumstances, the four-year plan was born of necessity and at worst contemplates complete equalization at the end of four years.

No decision of this Court has ever ascribed such meaning to the equal protection clause of the Constitution. The Court has repeatedly held that: The equal protection of the laws is more than an abstract right. It is a right which the state must accord all persons within its jurisdiction. A command the state must respect. Not a right to be accorded or withheld depending upon matters of convenience or expediency. *Hill vs. State of Texas,* 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159.

The Federal Constitution guarantees to the citizens of the several states the equal protection of the laws, "which is a pledge of the protection of equal laws." The guarantee has application in the administration of laws, by public

authority, though the law be fair on its face. If in its administration a real discrimination between persons in similar circumstances is applied, material to their rights. This without regard for whether the public agency charged with administration of the law, does or does not do all that its members are physically able to do to avoid the vice of discrimination.

It would not "make a mockery of the function of the board of equalization," as supposed by the Supreme Court, to require its functions to be exercised so as to accord equality. To the contrary, it is to make a mockery of the fundamental concept of the equal protection of laws, to hold that the vice of real discrimination may be condoned, on the pretext that the three-man board was doing all they could physically do so as to accord equality. Equality is the just and ultimate purpose of the law. If the Court must choose between discrimination on one hand and equality on the other, equality must be the choice. This without regard for the physical ability of three men. More employees might be hired, or the increased taxation can be delayed until the county-wide reassessments are complete. Either will accord equality. To hold that the plan at worst contemplates complete equality at the end of four years, in justifictaion of the discrimination, is to rest equality upon the barest conjecture. Indeed, it is to admit the denial of the equality the petitioners assert. It would be more accurate to say that the denial of equality will be complete at the end of four years. The discrimination is in the very teeth of the command of the Constitution.

An "unequal hand" in the administrtaion of a law, so as to practically deny equality between persons in similar circumstances, material to their rights, is a denial of equality within the prohibition of the Constitution. The question of whether the public authority had "a purpose or design to discriminate," is not material to the inquiry. The Constitution does not condone the discrimination whether with or without evil purpose or design. Room for the exer-

cise of arbitrary power is pre-empted by the language of the equal protection clause itself.

The argument finds ample support in the opinion of this Court in the case of *Cumberland Coal Co. vs. Board,* 284 U. S. 23, 76 L. Ed. 146, 52 S. Ct. 48. There the position of the state appellate court and the taxing authority were quite anagolous to the position of the Supreme Court of Alabama and the respondent in the case at bar. Mr. Chief Justice Hughes in delivering the opinion of the court first stated:

> "There is no question that the assessments under review were made pursuant to a deliberately adopted system. The case is not one of mere errors in judgment in following a proper method (*Sunday Lake Iron Co. v. Wakefield,* 247 U. S. 350, 352, 353, 38 S. Ct. 495, 62 L. Ed. 1154; *Southern R. Co. v. Watts,* 260 U. S. 519, 526, 43 S. Ct. 192, 67 L. Ed. 375), but one where the challenged discrimination resulted from a plan of assessment which was none the less systematic and intentional because of belief in its validity (*Raymond v. Chicago Union Traction Co.,* 207 U. S. 20, 35, 37, 28 S. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757; *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441, 445, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979; *Chicago Great Western R. Co. v. Kendall,* 266 U. S. 94, 98, 99, 45 S. Ct. 55, 69 L. Ed. 183)."

Then went on to answer the argument in support of the plan in the following language:

> "We are unable to agree with this view. It is established that the intentional, systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property. **Sunday Lake Iron Co. v. Wakefield, supra; Sioux City Bridge Co. v. Dakota County, supra; Raymond v. Chicago Union Traction Co., supra; Chicago Great Western R. Co. v. Kendall, supra.* In *Sioux City Bridge Co. v. Dakota County, supra* (at page 446 of

260 U. S. 43, S. Ct. 190, 192), this Court referring to the dilemma presented by a case where one or a few of a class of taxpayers are assessed at 100 per cent of the value of their property pursuant to statutory requirement and the rest of the class are intentionally assessed at a lower percentage, stated the rule to be as follows: 'This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.'

"In applying this principle, the fact that a uniform percentage of assigned values is used, cannot be regarded as important, if, in assigning the values to which the percentage is applied, a system is deliberately adopted which ignores differences in actual values so that property in the same class as that of the complaining taxpayer is valued at the same figure (according to the unit of valuation, as, for example, an acre) as the property of other owners which has an actual value admittedly higher. Applying the same ratio to the same assigned values, when the actual values differ, creates the same disparity in effect as applying a different ratio to actual values when the latter are the same. If the commissioners, in the instant case, had taken the basis of 100 per cent instead of 50 per cent of the assigned values, but had adopted the same method of assessment by which all the coal in a township * (aside from active coal) was assessed at the same value an acre, despite well-known and important differences in value, the result would have been an undervaluation of similar coal belonging to other owners, which would have brought the case of the petitioners within the principle of the decisions cited. In such case, if the petitioners' property had been valued at 100 per cent of its actual value, the like property of the other owners, having a higher actual value, would in effect have been valued at less than 100 per cent. The discrimina-

tion is essentially the same, and is equally repugnant to constitutional right, when both assessments are made on the basis of 50 per cent of assigned values and differences in actual values are deliberately and systematically disregarded. The undervalued property is in effect valued at less than 50 per cent of its actual value; for example, coal of the same description worth twice as much, as that of the Cumberland Coal Company was really valued at 25 per cent of its actual value.

"The petitioners are entitled to a readjustment of the assessments of their coal so as to put these assessments upon a basis of equality, with due regard to differences in actual value, with other assessments of the coal of the same class within the tax district."

To quote at length from more of the cited case would unduly extend this brief. Suffice it to say, they each support the contention of the petitioners. No decision of this Court is contra.

CONCLUSION

If the writ be granted, substantial rights of petitioners, and hundreds of taxpayers similarly situated, who have filed petitions for intervention, may be decided. The plan under attack has been followed since 1916. With each increase in market values, properties situated in the districts designated as step 1, 2 and 3, in the plan, are first increased in assessed value. Thus creating a permanent disparity in tax burden. The reassessment when completed does not compensate for the discrimination. The opinion of the Supreme Court to the contrary is a false premise. The denial of equal protection continues.

We, therefore, respectfully submit that the Court should grant the writ, to the end that this court may decide the federal question presented.

Respectfully submitted,

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